

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALEC ZARELLI,

Plaintiff,

V.

ENCOMPASS INSURANCE
COMPANY,

Defendant.

CASE NO. C15-5607 BHS

ORDER GRANTING
PLAINTIFF'S MOTION TO
REMAND

This matter comes before the Court on Plaintiff Alec Zarelli’s (“Zarelli”) motion to remand (Dkt. 13). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL AND FACTUAL BACKGROUND

On August 4, 2014, Zarelli's wife was driving on Pacific Highway in Fife, Washington. Dkt. 1-2 ("Comp.") ¶ 1.8. An uninsured motorist hit the right side of Zarelli's car. *Id.* Zarelli's car was worth less after it was repaired than before the accident. *Id.* ¶ 1.9.

1 Zarelli had an automobile insurance policy with Defendant Encompass Insurance
 2 Company (“Encompass”). *Id.* ¶ 1.2. Zarelli sought underinsured motorist coverage
 3 under his Encompass policy. *Id.* ¶¶ 1.10, 4.3. Zarelli alleges that Encompass did not
 4 compensate him for the diminished value of his car. *Id.* ¶¶ 1.10–1.11.

5 On July 28, 2015, Zarelli filed a class action complaint against Encompass in
 6 Pierce County Superior Court. *Id.* ¶ 1.1. Zarelli claims that Encompass has continuously
 7 failed to adjust losses to include diminished value. *Id.* ¶ 1.7. Zarelli seeks to certify a
 8 class entirely of Encompass insureds:

9 All ENCOMPASS insureds with Washington policies issued in
 Washington State, where the insured’s vehicle damages were covered under
 10 Underinsured Motorist coverage, and

- 11 1. the repair estimates on the vehicle (including any
 supplements) totaled at least \$1,000; and
- 12 2. the vehicle was no more than six years old (model year plus
 five years) and had less than 90,000 miles on it at the time of
 the accident; and
- 13 3. the vehicle suffered structural (frame) damage and/or
 deformed sheet metal and/or required body or paint work.

14 Excluded from the Class are (a) claims involving leased vehicles or
 total losses, and (b) the assigned Judge, the Judge’s staff and family.

15 *Id.* ¶ 5.3. Zarelli alleges that the number of class members will be about 316 and the
 16 average damages will be about \$1,460 per class member. *Id.* ¶ 2.4. Based on these
 17 numbers, Zarelli alleges the amount in controversy is \$461,360. *Id.* Zarelli asserts a
 18 breach of contract claim and a Washington Consumer Protection Act claim. *Id.* ¶¶ 6.1–
 19 6.10. Zarelli seeks compensatory damages and statutory attorney fees under RCW
 20 4.84.015. *Id.* ¶¶ 1.1, 7.1.

1 On August 27, 2015, Encompass removed the action to this Court under the Class
 2 Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d). Dkt. 1. Encompass’s notice of
 3 removal asserts that all CAFA requirements are satisfied. *See id.*

4 On September 28, 2015, Zarelli moved to remand and requested attorney fees.
 5 Dkt. 12. On October 26, 2015, Encompass responded. Dkt. 13. On October 28, 2015,
 6 Encompass filed supplemental authority. Dkt. 14. On October 30, 2015, Zarelli replied.
 7 Dkt. 15. On November 2, 2015, Encompass filed a surreply. Dkt. 17.

8 **II. DISCUSSION**

9 Zarelli moves to remand, arguing Encompass has failed to demonstrate that the
 10 amount in controversy exceeds CAFA’s jurisdictional requirement of \$5,000,000.¹ Dkt.
 11 12.

12 **A. CAFA Removal Standard**

13 “A defendant generally may remove a civil action if a federal district court would
 14 have original jurisdiction over the action.” *Allen v. Boeing Co.*, 784 F.3d 625, 628 (9th
 15 Cir. 2015). CAFA vests federal district courts with original jurisdiction over class
 16 actions involving more than 100 class members, minimal diversity, and at least
 17 \$5,000,000 in controversy, exclusive of interests and costs. *Dart Cherokee Basin*
 18 *Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014) (citing 28 U.S.C. § 1332(d)). A
 19 defendant seeking removal under CAFA must file a notice of removal “containing a short
 20 and plain statement of the grounds for removal.” 28 U.S.C. § 1446(a); *see also Dart*

21
 22 ¹ It is undisputed that this case satisfies CAFA’s numerosity and minimal diversity
 requirements.

1 *Cherokee*, 135 S. Ct. at 551. The burden of establishing removal jurisdiction remains on
2 the party seeking removal. *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685
3 (9th Cir. 2006). There is no presumption against removal under CAFA. *Dart Cherokee*,
4 135 S. Ct. at 554.

5 **B. Amount in Controversy**

6 To satisfy CAFA's amount in controversy requirement, the removing defendant
7 must plausibly allege in the notice of removal that the amount in controversy exceeds
8 \$5,000,000. *Id.* If the plaintiff challenges the defendant's allegation, the defendant must
9 then establish by a preponderance of the evidence that CAFA's amount in controversy
10 requirement has been satisfied. *Id.*

11 The preponderance of the evidence standard is not daunting, and only requires that
12 the defendant "provide evidence establishing that it is '*more likely than not*' that the
13 amount in controversy exceeds [\$5,000,000]." *Korn v. Polo Ralph Lauren Corp.*, 536 F.
14 Supp. 2d 1199, 1204 (E.D. Cal. 2008) (quoting *Sanchez v. Monumental Life Ins. Co.*, 102
15 F.3d 398, 404 (9th Cir. 1996)). Nevertheless, "CAFA's requirements are to be tested by
16 consideration of real evidence and the reality of what is at stake in the litigation, using
17 reasonable assumptions underlying the defendant's theory of damages exposure." *Ibarra*
18 *v. Manheim Invs., Inc.*, 775 F.3d 1193, 1198 (9th Cir. 2015). Both parties may submit
19 evidence outside the complaint, including affidavits, declarations, or other summary-
20 judgment-type evidence. *Id.* at 1197. "Under this system, a defendant cannot establish
21 removal jurisdiction by mere speculation and conjecture, with unreasonable
22 assumptions." *Id.*

1 In determining the amount in controversy, the Court first looks to the complaint.

2 *Id.* Generally, “the sum claimed by the plaintiff controls if the claim is apparently made
3 in good faith.” *St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283, 289 (1938).

4 In his complaint, Zarelli alleges that the number of class members will be 316 and the
5 average damages will be \$1,460 per class member. Comp. ¶ 2.4. Based on these
6 numbers, Zarelli alleges compensatory damages will total \$461,360. *Id.*

7 Encompass does not challenge the amount of compensatory damages pled in
8 Zarelli’s complaint. *See* Dkts. 1, 13. Instead, Encompass contends that the amount in
9 controversy exceeds \$5,000,000 because the figure should include (1) treble damages, (2)
10 attorney fees, and (3) the compensatory damages at issue in *Kogan v. Allstate*, U.S.
11 District Court, Western District of Washington Case No. C15-5559-BHS. Dkts. 1, 13.

12 Assuming without deciding that the amount in controversy should include treble
13 damages and attorney fees, the inclusion of treble damages and attorney fees does not
14 increase the amount in controversy to over \$5,000,000. Zarelli alleges compensatory
15 damages will total \$461,360—an amount Encompass does not contest. When
16 compensatory damages are trebled, the amount in controversy increases from \$461,360 to
17 \$1,384,080. With regard to attorney fees, Encompass asserts that attorney fees will total
18 \$1,365,012. Dkt. 1 at 19. Assuming Encompass’ fee calculation should be adopted, the
19 addition of attorney fees brings the amount in controversy from \$1,384,080 to
20 \$2,749,092. This amount is well below CAFA’s jurisdictional requirement of
21 \$5,000,000.

1 Thus, Encompass's basis for removal jurisdiction hinges on the inclusion of the
 2 compensatory damages at issue in *Kogan*. *Kogan* is another diminished value suit
 3 initiated by Zarelli's counsel that is currently pending before this Court. The *Kogan*
 4 plaintiffs filed a class action complaint against Allstate Fire and Casualty Insurance Co.
 5 ("Allstate") in state court, which Allstate removed to this Court under CAFA. C15-5559,
 6 Dkt. 1. The *Kogan* plaintiffs seek to certify a class entirely of Allstate insureds. C15-
 7 5559, Dkt. 1-2 ¶ 5.3. The Court recently denied the *Kogan* plaintiffs' motion to remand,
 8 finding that Allstate satisfied its burden of showing the amount in controversy exceeds
 9 \$5,000,000. C15-5559, Dkt. 22. Notably, Allstate did not argue that the compensatory
 10 damages in *Zarelli* should be included in *Kogan*'s amount in controversy calculation. *See*
 11 C15-5559, Dkts. 1, 16. It is undisputed that Allstate and Encompass are members of the
 12 same corporate family.

13 Encompass argues that Zarelli's counsel filed piecemeal lawsuits against members
 14 of the same corporate family, and therefore the Court should add the compensatory
 15 damages in *Kogan* to the amount in controversy in this case. Dkt. 13 at 9. While the
 16 Court aggregates the claims of individual class members in the same suit to determine
 17 whether the amount in controversy exceeds \$5,000,000, *see* 28 U.S.C. § 1332(d)(6),
 18 Encompass seeks to aggregate the claims of different plaintiffs in a separate suit against a
 19 different defendant to satisfy its burden under CAFA in this case.

20 To support its argument, Encompass primarily relies on two out-of-circuit cases:
 21 *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008), and *Proffitt v.*
 22 *Abbott Laboratories*, No. 08-CV-151, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008).

1 Dkt. 13 at 13–14. Both cases involved plaintiffs who split their claims against one
 2 defendant into multiple suits covering discrete time periods to avoid triggering CAFA’s
 3 amount in controversy requirement.

4 In *Freeman*, the plaintiffs divided their nuisance suit against a paper mill into “five
 5 separate suits covering distinct six-month time periods,” and limited “the total damages
 6 for each suit to less than CAFA’s \$5 million threshold.” 551 F.3d at 406. The Sixth
 7 Circuit determined the five suits should be treated as one suit worth up to \$24.5 million
 8 because the plaintiffs splintered their lawsuits for “no colorable reason.” *Id.* at 409. The
 9 court limited its holding “to the situation where there is no colorable basis for dividing up
 10 the sought-for retrospective relief into separate time periods, other than to frustrate
 11 CAFA.” *Id.*

12 Similarly, in *Proffitt*, the plaintiff divided its antitrust suit into “eleven lawsuits
 13 that [were] identical except for the time periods that they allege[d] to cover.” 2008 WL
 14 4401367, at *1. These time divisions were “completely arbitrary.” *Id.* at *2. Moreover,
 15 each of the eleven complaints included a disclaimer limiting damages to \$4,999,000. *Id.*
 16 The court determined the eleven suits should be treated as one suit because they all
 17 involved “one alleged conspiracy, one plaintiff, [and] one defendant.” *Id.* at *5. The
 18 court further explained there was “no justification for dividing one alleged drug
 19 conspiracy involving one defendant into eleven lawsuits under these circumstances other
 20 than to circumvent the CAFA and federal court jurisdiction.” *Id.* at *5.

21 Unlike the plaintiffs in *Freeman* and *Proffitt*, Zarelli has not filed identical
 22 lawsuits artificially splintered by time against the same defendant. Instead, Zarelli’s

1 counsel has filed two diminished value suits on behalf of two sets of plaintiffs based on
2 which company issued the relevant insurance policy. Although *Kogan* and *Zarelli* are
3 similar, each suit has different plaintiffs, different proposed class members, and different
4 defendants. Under these circumstances, the Court declines to aggregate the
5 compensatory damages in *Kogan* with the compensatory damages in this case.

6 Without the compensatory damages in *Kogan*, the amount in controversy in this
7 case does not exceed \$5,000,000. Even assuming treble damages and attorney fees
8 should be included, the amount in controversy only totals \$2,749,092. Because
9 Encompass has not met its burden of establishing removal jurisdiction under CAFA, the
10 Court grants *Zarelli*'s motion and remands this case.

11 **C. Attorney Fees**

12 Having granted *Zarelli*'s motion to remand, the Court turns to *Zarelli*'s request for
13 attorney fees incurred as a result of removal. Dkt. 12 at 19. "An order remanding the
14 case may require payment of just costs and any actual expenses, including attorney fees,
15 incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent unusual
16 circumstances, courts may award attorney's fees under § 1447(c) only where the
17 removing party lacked an objectively reasonable basis for seeking removal." *Martin v.*
18 *Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Although it is a close call, the Court
19 is unable to conclude that Encompass lacked an objectively reasonable basis for
20 removing this case. The Court therefore denies *Zarelli*'s request for attorney fees.

21

22

III. ORDER

2 Therefore, it is hereby **ORDERED** that Zarelli's motion to remand (Dkt. 12) is
3 **GRANTED**. Zarelli's request for attorney fees (Dkt. 12) is **DENIED**. This action is
4 **REMANDED** to Pierce County Superior Court.

5 Dated this 17th day of November, 2015.



BENJAMIN H. SETTLE
United States District Judge